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No. 1041

IN THE

# Supreme Court of the United States

OCTOBER TERM 1966

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NEZ PERCE TRIBE OF INDIANS,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Claims**

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Petitioner, the Nez Perce Tribe of Indians of Idaho, prays that a writ of certiorari issue to the Court of Claims to review the judgment of the Court entered in the above-entitled case on July 15, 1966.

## OPINION BELOW

The opinion of the Court of Claims, July 15, 1966 (as yet unreported) is reprinted as Appendix A below.

## JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1966. Rehearing was denied on November 10, 1966. Jurisdiction is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c), and 28 U.S.C. § 1255.

## STATUTE INVOLVED

Agreement of May 1, 1893, ratified by Act of August 15, 1894, 28 Stat. 286, 326-332, I Kapp. 536, reprinted as Appendix B.

## QUESTION PRESENTED

Where under an 1894 agreement with an Indian Tribe the United States buys certain land, promising to pay part of the proceeds at once, and to place the balance in the Treasury in trust for the Indians at interest, and where the price paid is so inadequate that additional compensation is later awarded by the Indian Claims Commission, does the original promise to pay interest on the balance apply to the additional compensation, so as to place the Indians in the same position that they would have been in had they been paid adequately in the first place?

## STATEMENT OF THE CASE

The Nez Perce Indians, formerly one of the proud tribes of the Northwest, today reside on scattered individual allotments in the northern part of Idaho, near Lewiston. Aboriginally they occupied a vast area in Washington, Idaho and Oregon. The pressure of white settlement led to the first cession in 1855,[1] whereby the Indians ceded some of their land, and kept the rest, about 7,000,000 acres, as a reservation. Gold was discovered on this reservation in 1860, which led to uncontrolled white trespasses, trouble, and eventually another cession in 1863.[2] This cession reduced the Indians' reservation to 762,000 acres.[3]

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[1] Treaty of June 11, 1855, 12 Stat. 957.

[2] Treaty of June 9, 1863, 14 Stat. 647.

[3] This background is detailed in *Nez Perce Tribe* v. *United States*, 3 Ind.Cl.Com. 571 (1955); *Nez Perce Tribe* v. *United States*, 8 Ind. Cl.Com. 220 (1959); and *Nez Perce Tribe* v. *United States*, 13 Ind. Cl.Com. 184 (1964). The latter is the instant case.

Unfortunately for the Indians, their 1863 reservation still contained good lands coveted by the white settlers, and this resulted in the final disappearance of the Nez Perce reservation as a tribally-owned unit. Under the Agreement of 1894,[4] each adult Indian was allowed to select an allotment, and the checkerboarded remainder, some 549,559 acres, was thrown open to white settlement. The Indians were paid $2.97 per acre.[5]

In 1951, pursuant to the Indian Claims Commission Act,[6] the Nez Perce Tribe filed a claim with the Indian Claims Commission. The Indians claimed the true value of the land they ceded was much greater than $3.00 per acre. They alleged fraud, duress, unconscionable consideration, unilateral mistake, and sought to recover "just compensation."[7]

Article 3 of the 1894 Agreement provided that out of the money to be paid to the Indians, $626,222 was to be paid to the individual Indians per capita as soon as practicable, and

> "The remainder of said sum of [$1,626,222] shall be deposited in the Treasury of the United States to the credit of the 'Nes Perces Indians, of Idaho,' *and shall bear interest at the rate of five per centum per annum,* which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended

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[4] Appendix B; 28 Stat. 286, 326-332.

[5] The Agreement called for $3.00 per acre, but the amount actually paid was $2.97. Appendix A p. 14.

[6] 60 Stat. 1049 (1946), 25 U.S.C. § 70.

[7] Petition, p. 4.

> portion of the fund of one million dollars until the entire amount shall have been paid. . . ." (Emphasis added)[8]

The Indians asked the Commission not only to award additional compensation for the land, but also to award interest on such additional compensation, to place them in the same position they would have been in had they been paid their due in 1893. They referred to the Indian Claims Commission Act, which expressly authorizes the Commission to hear and determine.

> ". . . (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or on any other ground cognizable by a court of equity; . . ."[9]

The Indians argued that their claim for interest should be allowed on the grounds that if the Agreement were revised to provide for a fair price for the land, that part of the price which exceeded $626,222 would draw interest under the express terms of the Agreement.[10]

The majority opinion of the Commission held that the Indians had been paid $2.97 per acre, that the land was worth no more than $4.00, and that the difference was not great enough to justify a recovery for the Indians.[11] Consequently, they did not reach the interest claim. However, Commissioner Scott, in a separate opinion, assumed the validity of the interest claim; he said:

> "If the agreement was considered as revised on the basis of unconscionable consideration, and it could

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[8] 28 Stat. at 329, Appendix B at p. 32.

[9] 25 U.S.C. § 70a(3).

[10] Brief before Commission, October 24, 1961, pp. 122, 150.

[11] 13 Ind.Cl.Comm. at 264.

be assumed this amount was deposited in the Treasury in 1894 and left there by the Nez Perce at the rate of 5% provided in the agreement until 1964, and compounded annually, they would have $17,222,-749.47 to their credit." [12]

Commissioner Scott used a compound interest factor; however, the Indians claim only 5% simple interest (which would amount to about 350% over the 70 years that the Indians have been deprived of their fair compensation). Incidentally, the majority of the Court of Claims, as discussed at p. 6 below, calculated that the extra consideration would probably have been paid out to the Indians over five years, and thus would have earned only about $200,000.[13]

The Indians appealed. They argued:

(1) The land was worth much more than the $4.00 per acre found by the Commission.

(2) Even if the land was worth only $4.00, still that meant the Indians were paid $566,000 less than they should have been paid, and that amount was sufficiently large to be "unconscionable."

(3) Whatever additional sum the Indians were awarded should bear interest (on the grounds explained above).[14]

The Court of Claims handed down its opinion on July 15, 1966. It intimated in very strong terms that it thought the land was worth more than $4.00 an acre,[15]

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[12] Id. p. 269.

[13] Appendix A, p. 25.

[14] Brief before Court of Claims, June 3, 1965, p. 84.

[15] For example, ". . . unlike the Commission, we think this [$4.00 per acre] is a minimum figure." Appendix A, p. 15.

Also, ". . . the evidence shows that the land was worth a minimum and not a maximum of $4 per acre . . ." Id. p. 19.

[Footnote continued on page 6.]

indicating possibly that it was worth $5.00 to $7.00.[16] However, it stated that the $4.00 figure was "supported by substantial evidence." [17]

In discussing the second issue, whether $2.97 was an unconscionable price for lands worth a minimum of $4.00, the Court indicated its clear feeling that the $2.97 was unconscionable (because at $4 per acre the Indians received $566,000 less than they were entitled to), reversed the Commission, and remanded for further proceedings in conformity with the opinion.

The Court also disposed of the interest issue, rejecting the Indians' claim, on the ground that the Agreement called for a price of exactly $1,626,222 and that the interest clause applied only to this sum, and not to the greater sum that would have been paid had the Agreement been revised to provide for payment of the fair market value of the land.[18]

Motion for rehearing was denied November 10, 1966, and this petition for certiorari was duly filed.

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[15] Continued

Also, ". . . it is possible to come up with . . . $5 to $7." Id. p. 21.

Also, ". . . the very size of the premium here suggests that the bargain [for the U.S.] was too good." Id. p. 23.

Also, ". . . the $4 per acre figure . . . is a bare minimum," and ". . . the evidence would support a higher value." Id. p. 25.

Also, ". . . no reasonable seller in a willing transaction under any circumstances would have parted with ownership of the ceded area for less than $4 per acre." Id. p. 26.

[16] Appendix A, p. 21.

[17] Id. p. 22.

[18] Appendix A, pp. 26-28.

## REASONS FOR GRANTING THE WRIT

### The Decision of the Court of Claims Conflicts with the Decisions of this Court and with Its Own Decisions

In *United States* v. *Blackfeather*,[19] a decision of this Court, the United States entered into a treaty with the Shawnee Indians, whereby the Indians ceded lands to the United States and the United States agreed to sell such land at public sale to the highest bidder. The net proceeds of sale were to constitute[20]

> ". . . a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity."

Instead of auctioning the lands as required by the treaty, the United States sold most of them at private sale at a flat $1.25 per acre. The lower court held this was a breach of agreement, and that the Indians were entitled to recover the additional amount they would have received had the lands been auctioned.

The Indians claimed interest under the treaty clause quoted above. This Court held that the quoted clause was an agreement to pay interest, and that under it the Indians were entitled to interest. This Court held:[21]

> "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity con-

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[19] 155 U.S. 180 (1894).

[20] 155 U.S. at 188.

[21] 155 U.S. at 193.

tinues until the money is paid over. Upon the whole, we think the court did not err in allowing interest."

In *Mille Lac Indians* v. *United States*,[22] a statute authorized obtaining a cession of land from the Indians, and the auctioning of such land to the public.[23] The proceeds were to be placed in the Treasury at 5% interest. Certain lands were not sold in accordance with the statute. The Court awarded the value of the land as if it had been sold in accordance with the statute, and allowed 5% interest thereon.

In *Peoria Tribe* v. *United States*,[24] the United States agreed to sell some Indian land at public auction, and to pay the Indians the net proceeds. Instead, the United States sold it to settlers at appraised prices. The Indian Claims Commission found that the true value of the land was $172,726.04 more than the Indians had received, and awarded that amount to the Indians.

The Indians claimed interest on the basis of the treaty involved, which said:

> "And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement." [25]

The Indians argued that this language amounted to an agreement to pay interest on the proceeds of sale, and

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[22] 47 Ct.Cl. 415, 462 (1912), reversed other grounds, 229 U.S. 498 (1913), further proceedings, 51 Ct.Cl. 400, 407-408 (1916).

[23] 25 Stat. 642 (1889).

[24] Ct.Cl., Dec. 16, 1966, as yet unreported.

[25] 10 Stat. 1082, Article 7.

that the additional payment of $172,726.04 was in effect proceeds of sale.

Three of the judges ruled against the Indians on the ground that the President had been given discretion whether to pay over the proceeds or invest them at interest, and since he was not required to do the latter, there was no agreement to pay interest. *Blackfeather*[26] was distinguished on the ground that the treaty there unequivocally promised to pay interest on the proceeds.

Two judges dissented. They thought the possibility that the President might elect to pay the additional proceeds direct to the Indians was "most unlikely," and therefore, in all probability, he would have invested the proceeds, and therefore the Indians should have the interest.

It is impossible to reconcile the foregoing cases. Interest was allowed in *Blackfeather* and *Mille Lac*, and denied in *Peoria* and the instant case. In each case the United States failed to pay enough money to the Indians at the time of the transaction. In each case additional money was awarded by the court acting under jurisdiction conferred by a special jurisdictional act. In each case the treaty, agreement or statute involved provided for interest on the price paid. In no case did Congress expressly allow or even consider the allowance of interest on the additional sum awarded long after the original transaction had been closed which means that the differing results cannot be predicated on congressional intent.

A case of particular interest is *Menominee Tribe* v. *United States*.[27] In that case one statute called for the sale of timber belonging to the Indians, the proceeds to be deposited in the Treasury at 5% interest. Another statute called for Government operation of a sawmill, the

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[26] Note 19 above.

[27] 107 Ct.Cl. 23 (1946).

net proceeds to be deposited in the Treasury at 4% interest. The Government sold the timber and operated the sawmill, and paid interest on the proceeds once they were deposited into the Treasury. But the Indians claimed the Government had not promptly deposited the proceeds, and claimed interest on the proceeds during the periods of delay. The Court held that Congress did not intend for interest to begin until the proceeds were deposited in the Treasury, but held also that there was an implied agreement [28] to deposit the proceeds promptly, and that interest would begin running as soon as the proceeds could have been deposited by the exercise of reasonable diligence.

It would seem that if the statute in *Menominee* is read to call for interest as if deposits had been promptly made, the Agreement in the instant case should be read to call for interest as if payment had been adequately made. Indeed, the latter is exactly what this Court held in *Blackfeather*, and the Court of Claims held in *Mille Lac*.

Generally, of course, interest is not allowable on Indian claims [29] unless the claim arises from a "taking" under the Fifth Amendment,[30] or unless a treaty, statute or contract expressly (or impliedly) provides for interest.[31] The question we raise (interest on additional compensation where the initial compensation was expressly entitled to interest) may seem narrow, yet it has been litigated several times in the past, as cited above,[32] with

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[28] Id. at 32.

[29] *United States* v. *Alcea Band*, 341 U.S. 48, 49 (1951).

[30] *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937).

[31] *United States* v. *Blackfeather*, 155 U.S. 180 (1894); *Menominee Tribe* v. *United States*, 107 Ct.Cl. 23 (1946).

[32] For example, *Blackfeather*, note 19 above; *Mille Lac*, note 22 above; *Peoria*, note 24 above; and, of course, the instant case.

conflicting results. The question will be litigated in the future.[33] A modern decision by this Court, reaffirming *Blackfeather* and the extra duty of fairness on the part in dealing with its Indian wards,[34] is needed in order to dispel the confusion caused by conflicting decisions in the Court of Claims.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[33] For example, the same issue as now raised is pending in *Klamath Tribe* v. *United States*, Docket 100A, now pending before the Indian Claims Commission. See Plaintiffs' Proposed Findings in that case, April 15, 1964.

[34] A duty recognized by this Court from *Worcester* v. *Georgia*, 31 U.S. (6 Pet.), 515, 582 (1832) to *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956), and by Congress from the Northwest Ordinance of 1789, 1 Stat. 51n, Art. III ("the utmost good faith shall always be observed toward the Indians") to the Indian Claims Commission Act, 25 U.S.C. § 70.